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PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional)						
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		10/675,820	September 30, 2003					
		First Named Inventor						
		Gary K. Michelson						
Art Unit		Examiner						
3733		James L. Swiger III						
<p>Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.</p> <p>This request is being filed with a notice of appeal.</p> <p>The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.</p> <p>I am the</p> <table border="0"><tr><td><input type="checkbox"/> applicant/inventor.</td><td rowspan="4"> Signature Thomas H. Martin Typed or printed name 330-877-0700 Telephone number September 24, 2008 Date</td></tr><tr><td><input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/98)</td></tr><tr><td><input checked="" type="checkbox"/> attorney or agent of record. Registration number 34,383</td></tr><tr><td><input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____</td></tr></table> <p>NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below.</p> <p><input checked="" type="checkbox"/> Total of 1 forms are submitted.</p>				<input type="checkbox"/> applicant/inventor.	 Signature Thomas H. Martin Typed or printed name 330-877-0700 Telephone number September 24, 2008 Date	<input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/98)	<input checked="" type="checkbox"/> attorney or agent of record. Registration number 34,383	<input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____
<input type="checkbox"/> applicant/inventor.	 Signature Thomas H. Martin Typed or printed name 330-877-0700 Telephone number September 24, 2008 Date							
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<input checked="" type="checkbox"/> attorney or agent of record. Registration number 34,383								
<input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____								

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.8. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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RESPONSE UNDER 37 C.F.R. 1.116  
EXPEDITED PROCEDURE  
EXAMINING GROUP 3733PATENT  
Attorney Docket No. 101.0093-01000  
Customer No. 22882

## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:	)	Confirmation No.: 6670
Gary K. Michelson	)	
Serial No.: 10/675,820	)	Group Art Unit: 3733
Filed: September 30, 2003	)	Examiner: James L. Swiger III
For: DYNAMIC GUARD	)	

Mail Stop AF  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

**PRE-APPEAL BRIEF REQUEST FOR REVIEW**

In reply to the Final Office Action of July 25, 2008 ("Final Action"), Applicant submits the following remarks for consideration by the Members of the Pre-Appeal Brief Conference.

**I. Brief Background**

The present application includes one independent claim, claim 1, generally drawn to a guard for use in human spinal surgery. Claims 1-30 are rejected under 35 U.S.C. § 103(a). The rejection of claim 1 under 35 U.S.C. § 103(a) is the subject of this Request for a Pre-Appeal Conference.

**II. Clear Error**

(A) The Examiner's rejection of claims 1-28 (including independent claim 1) under 35 U.S.C. § 103(a) as being unpatentable over U.S. Publication No. 2003/0135220 to Cauthen ("Cauthen") in view of U.S. Patent 5,846,249 to Thompson ("Thompson") is erroneous because:

(1) the rejection of independent claim 1 is based on a combination of Cauthen and Thompson that cannot be maintained because Thompson is non-analogous to the claimed invention;

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(a) Independent claim 1 of the present application is directed to a guard for use in human spinal surgery;

(b) according to MPEP § 2141.01, "a reference in a field different from that of Applicant's endeavor may be reasonably pertinent if it is one which, because of the matter with which it deals, logically would have commended itself to an inventor's attention in considering his or her invention as a whole," hence, the pertinence of a reference is determined by whether the reference can be logically associated with the claimed invention;

(c) Thompson is directed to video gynecological examination apparatus used in conjunction with conventional speculums for dilating a patient's vagina, and the Examiner relies on one of the conventional speculums disclosed therein for rejecting independent claim 1;

(d) because the speculum is inserted into a patient's vagina to facilitate dilation thereof, Applicant submits that the speculum of Thompson, at the very least, is not logically associated with the claimed invention;

(e) therefore, Thompson is non-analogous art to the claimed invention, and, accordingly, Applicant submits that Thomson cannot be used as the basis for an obviousness rejection of independent claim 1;

2) Cauthen and Thompson teach away from one another;

(a) contrary to the teachings of Thompson, where arms 123 and associated hinged connections between an upper portion and a lower portion are positioned at the trailing end of a speculum 103, Cauthen teaches that an articulating hinge (22) of an insertion instrument (10) of Figs. 1 and 2 and articulating hinges (22) and (36) of another insertion instrument (10) of Figs. 13 and 14 are positioned adjacent the leading ends of the insertion instruments (10),

(b) furthermore, while the pivot axes of the articulating hinge (22) of Figs. 1 and 2 and the articulating hinges (22) and (36) of Figs. 13 and 14 are

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disposed on the exterior of the hollow bodies (12), the handle (18) and the handles (18) and (37) of Cauthen, contrary to the teachings of Thompson (where the upper portion and the lower portion are spaced apart from one another), are not offset from the hollow bodies (12).

(B) Given that Thompson is non-analogous art, and that Cauthen and Thompson teach away from one another, Applicant submits that the Examiner's rejection under 35 U.S.C. § 103(a) based on Cauthen and Thompson cannot be maintained.

### III. Conclusion

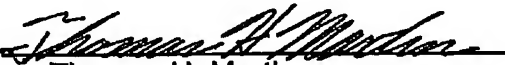
In view of the foregoing remarks, it is respectfully submitted that the claims are patentable. Therefore, it is requested that the Members of the Pre-Appeal Brief Conference reconsider the outstanding rejections in view of the preceding comments. Issuance of a timely Notice of Allowance of the claims is earnestly solicited.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this reply, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-3726.

Respectfully submitted,

MARTIN & FERRARO, LLP

Dated: September 24, 2008

By:   
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